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Supreme Court of the United States

October Term, 1977

No. 77-629

ASHBY LEACH, R. RAYMOND TWOHIG, ROGER HURLEY,

Petitioners,

vs.

EUGENE SAWICKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Ohio Supreme Court

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Supreme Court of the United States

October Term, 1977

No._____

ASHBY LEACH, R. RAYMOND TWOHIG,
ROGER HURLEY,
Petitioners,

vs.

EUGENE SAWICKI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Ohio Supreme Court

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio dismissing the petitioners' complaint for a writ of mandamus.

CITATION TO OPINION BELOW

The Ohio Supreme Court did not issue an opinion. The journal entry of the dismissal by the Supreme Court of the Petitioners' Complaint for a Writ of Mandamus is reproduced in the Appendix at p. A14. The Opinion of the Court of Appeals of Ohio in a companion case is reproduced in the Appendix at p. A5. The two orders promulgated by the respondent are reproduced in the Appendix at pp. A1 and A9.

JURISDICTION

The judgment of the Supreme Court of Ohio was rendered and filed on June 3, 1977. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1257(3). The Ohio Supreme Court denied the Complaint for a Writ of Mandamus on June 3, 1977. On September 6, 1977, Mr. Justice Stewart granted an extension of time in which to file the Petition for Writ of Certiorari until September 29, 1977. On September 30, 1977, Mr. Justice Stewart granted a further extension of time to file this Petition until October 31, 1977.

QUESTIONS PRESENTED

1. Whether a judge presiding over a criminal trial can without notice or prior hearing order the defendant and his attorneys not to talk to the public, including the press, about the case, thereby imposing a prior restraint on the petitioners' rights to freedom of speech.

2. Whether the First Amendment allows a judge presiding over a criminal trial to impose a prior restraint on petitioners' rights to freedom of speech.

3. Whether the Respondent's order forbidding the petitioners to speak to anyone about the case is unconstitutionally overbroad.

4. Whether the Respondent's order forbidding the Petitioners to speak to anyone about the case outside of the courtroom denied Petitioner Leach his right to a public trial.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

First Amendment (in part)

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sixth Amendment (in part)

In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . .

Fourteenth Amendment (in part)

No State shall deprive any person of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

Petitioner Ashby Leach was charged with 13 counts of kidnapping, one count of felonious assault, one count of extortion and one count of possession of criminal tools. The charges against Leach resulted from his occupation of the Chessie Corporation's offices in Cleveland, Ohio, an event which received widespread national publicity. Petitioners Twohig and Hurley were Leach's trial counsel and the Respondent Sawicki, a judge of the Court of Common Pleas of Cuyahoga County, Ohio, presided over the trial.

On March 14, 1977, the case was called for trial and without a prior hearing or notice Judge Sawicki issued an order regulating the conduct of the parties and others during the trial. A copy of this order is reproduced in the Appendix at p. A1. Among other things, it prohibited

Ashby Leach and his attorneys from talking about the case to anyone outside of the courtroom and it prohibited any demonstrations within a three block area of the courthouse. On March 15, 1977, the Petitioners filed a Petition for a Writ of Mandamus in the Court of Appeals of Ohio, Eighth Judicial District, asking that Court to vacate the Respondent's order of March 14, 1977.

On March 16, 1977, after argument the Court of Appeals issued a Judgment Entry and Opinion which is reproduced in the Appendix at p. A5. On March 17, 1977, the Court of Appeals issued a Supplemental Journal Entry and Opinion which is reproduced in the Appendix at p. A8. The Court of Appeals ordered Judge Sawicki to vacate his order of March 14, 1977, as it applied to all nonparties to the trial.

On March 18, 1977, Respondent Sawicki vacated his order of March 14, 1977, and issued another restrictive order, which is reproduced in the Appendix at p. A9. The following two paragraphs were included in the Order:

> *ITEM II.* Witnesses, prospective and selected jurors, and those persons summoned but excused from serving as jurors, are forbidden to participate in interviews and from making statements for publicity from this date and until such time as a verdict in this case is returned in open court.
>
> *ITEM IV.* All lawyers participating in this hearing, their office associates, staff members and employees under their supervision and control are forbidden to take part in interviews for publicity and from making extrajudicial statements from this date until such time as a verdict is returned in this case in open court. Canon 20 of the Canons of Professional Ethics of the American Bar Association is hereby incorporated in and made a part of this Order.

Because Petitioner Leach was a witness on his own behalf and acted as co-counsel, the effect of these two paragraphs was to forbid Leach and his two attorneys from discussing the case outside the courtroom.

On April 4, 1977, while the trial was still proceeding the Petitioners filed a Complaint for a Writ of Mandamus in the Supreme Court of Ohio, requesting that Court to order Judge Sawicki to conduct a due process hearing before issuing any further order restricting Petitioners' rights to free speech. The Complaint also sought an order directing Respondent not to unconstitutionally infringe upon Petitioners' First Amendment rights to freedom of speech; and not to deny Petitioner Leach his constitutional right to a public trial. The Petitioners also moved the Supreme Court of Ohio to stay Leach's trial until the Court acted upon the Complaint for Writ of Mandamus and to hold an expedited hearing upon the Complaint. Both motions were denied (See Appendix at p. A13), and on June 3, 1977, the Supreme Court of Ohio dismissed the Petitioners' Complaint for a Writ of Mandamus. (See Appendix at p. A14.)

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted because the Respondent's order of March 18, 1977, issued *sua sponte,* without notice or prior hearing, violated the Petitioners' constitutional rights to freedom of speech, due process of law and right to a public trial and is a special and important constitutional issue not heretofore determined by this Court.

This Court did reach some questions regarding prior restraints on the press in *Nebraska Press Assoc. v. Stuart,* 427 U.S. 539 (1976), but did not reach all issues. Petitioners now ask the Court to reach the issue of whether an absolute ban on public statements by a criminal defendant and his attorneys, issued on the first day of trial *sua sponte,* without notice or prior hearing concerning the

need for or effect of such an order, passes constitutional muster.

1. Judge Sawicki's Order of March 18, 1977 Violated the Petitioners' First and Fourteenth Amendment Rights to a Hearing.

The Fourteenth Amendment to the Constitution of the United States states in part that:

> ". . . nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

The Courts have consistently held that when the State attempts to deprive a person of a constitutionally protected right, the due process clause of the Fourteenth Amendment requires that said person be given proper notice and be afforded an adequate and impartial hearing before a competent tribunal. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The requirement for a hearing is especially compelling where, as here, the deprivation is of a First Amendment freedom, particularly where the deprivation is in the nature of a prior restraint of that freedom. The First Amendment also requires a prior hearing before imposing a restraint on speech so as to insure that the government meets its heavy burden for justifying a prior restraint on speech. The fact that in this case the prior restraint of speech was imposed on a defendant and his attorneys involved in a criminal trial makes no difference. As the Court held in *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970):

> . . . before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing

> that defendants' and their attorneys' conduct is "a serious and imminent threat to the administration of justice". 435 F.2d at 1061.

See also *In Re Oliver*, 452 F.2d 111 (7th Cir. 1971); *CBS v. Young*, 522 F.2d 234 (6th Cir. 1975); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975).

Because the required procedure was not followed in this case the order was unconstitutional.

2. Respondent's Restrictive Order of March 18, 1977 Is a Prior Restraint of Speech Which Unconstitutionally Abridges Rights Guaranteed to the Petitioners by the First Amendment to the United States Constitution.

Respondent's restrictive order was a prior restraint on the exercise of Petitioners' First Amendment freedoms of speech (see Appendix at p. A9) and the order was imposed without any prior notice nor any showing to the Court as to the need for such an order.

It is well established that any prior restraint on the exercise of First Amendment freedoms comes to the Court with a "'heavy presumption' against its constitutional validity." *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). In fact, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 at 559 (1976). In the instant case, no evidence was presented or taken relative to the need for the restrictive order. Thus no attempt was made to meet the heavy burden required to justify a prior restraint.

In *Nebraska Press Assoc., supra*, this Court has recently spoken on the subject of prior restraints. "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." 427 U.S. at 559. To determine whether

or not the restrictive order entered by the trial judge in *Nebraska* was constitutionally defective, this Court "examine[d] the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger." (*Nebraska, supra* at 562.)

A similar inquiry in the instant case reveals that while the extent of the pretrial news coverage may have been great, there was no examination into its nature and extent. Furthermore, with respect to the other traditional methods likely to mitigate the effects of pretrial publicity; i.e., change of venue, sequestration, evidentiary hearing on pretrial publicity, and continuance, all were requested but summarily denied by the trial court. It is significant to note that "when this Court has reversed a state conviction because of prejudicial publicity, it has carefully noted that some course of action short of prior restraint would have made a critical difference." *Nebraska, supra*, 427 U.S. at 569. Failure of the trial court in the instant case to attempt more traditional methods before imposing a prior restraint upon Petitioners' First Amendment rights was constitutionally defective. Furthermore, no attempt was made to determine how effective the restrictive order might be in preventing any threatened danger.

The fact that in this case the prior restraint was imposed on a defendant and his attorneys involved in a criminal trial does not change the requirements of the First Amendment. *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970); *CBS v. Young*, 522 F.2d 234 (6th Cir. 1975); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975).

Restrictive orders such as the instant order attempt to find their ultimate justification in the Sixth Amendment. The conflict between the Sixth Amendment and the First Amendment has been often written about. Generally though, such comment has concerned the conflict between the press and its need to gather and disseminate information and the defendant who seeks to insulate his right to a fair trial by limiting and proscribing the actions of the press. Such was the situation in *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976) and *Sheppard v. Maxwell*, 384 U.S. 334 (1966).

In *Nebraska Press Assoc.* the defendant and the prosecution joined in requesting the restrictive order. In the instant case, the Petitioner Leach strenuously objected to the restrictive order and the prosecution made no request for such an order. The right to a fair trial guaranteed to the Petitioner Leach by the Sixth and Fourteenth Amendments appears to be a defendant's right. Consequently, if First and Sixth Amendment rights are to be balanced, when the defendent himself asserts the importance of his First Amendment rights, there should be little room for doubt as to which interest is overriding.

Petitioner Leach asserts that his Sixth and First Amendment rights are complimentary and not in conflict with one another. This position is in line with that of Mr. Justice Brennan concurring in *Nebraska Press Assoc. v. Stuart*, 427 U.S. at 572-573:

> The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights. I would hold, however, that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right; judges have at their disposal a broad spectrum of devices for ensuring that fundamental fairness is accorded the accused without necessitating so drastic an incursion on the equally

> fundamental and salutary constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors.

The trial court chose not to resort to the other methods at its disposal in the instant case. Consequently, the order is unconstitutional.

3. Respondent's Restrictive Order of March 18, 1977 Is Unconstitutionally Overbroad and Sweeps Within Its Scope Expression Which Could Not Arguably Threaten the Administration of Justice.

Assuming *arguendo* that the trial court may have been justified in imposing some restrictions, it was certainly not justified in prohibiting speech or publications which would not interfere with Petitioner Leach's right to a fair trial. It is well settled that restrictions upon protected speech must be drawn as narrowly as possible without unnecessarily curtailing protected activity. As this Court stated in *Carroll v. Princess Anne*, 393 U.S. 175 (1968):

> An order issued in the area of the First Amendment must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case. 393 U.S. at 183, 184.

The trial court's restrictive order is constitutionally infirm. It sweeps unnecessarily broadly and was not cast in the narrowest terms that would have accomplished the trial court's only proper objectives.

In the instant case, the only arguably valid purpose for any restriction would be to prevent the jury from being prejudiced by being exposed to prejudicial material in news stories. This order went far beyond what was necessary to accomplish that purpose.

First, the instant order is so terribly broad in its subject matter reach that it does not even limit itself to discussions by the petitioners which might arguably prejudice Petitioner Leach's right to a fair trial. It is so broadly drawn that *any* extrajudicial statements made by Petitioners or their associates, staff members, or employees were prohibited. (See Section IV of the March 18, 1977 order. Appendix at p. A10.) This language would, for example, prevent Petitioners from discussing with the press such mundane matters as who might testify for the defense.

Second, the order is too broad because it was issued to be in effect until the case was disposed of or until further order of the Court. (See Item XIV of Restrictive Order of March 18, 1977, Appendix at p. A11.) The order clearly prohibited speech until such time as a verdict was returned. Less broad language might have prohibited speech until such time as the jury was impaneled at which time the jury could have been insulated from prejudicial publicity by less restrictive measures such as admonition by the Court or even sequestration, if necessary. The trial court, however, specifically refused to adopt any less restrictive measures of controlling the flow of prejudicial matter to the jury by denying the defendant's request for change of venue, continuance and sequestration. Hence, the trial court drew the order too broadly by allowing it to extend until "a verdict is returned" or "until further order of the Court", because other means less offensive to the First Amendment were available.

Finally, the order has little relationship to the purpose of preventing prejudicial publicity, since it was not issued until trial began. By that time the case had already received substantial publicity to which prospective jurors had been exposed.

There is no doubt that the respondent selected a relatively easy way of attempting to avoid prejudicial pub-

licity. The court appears not to have seriously considered a narrower order or less drastic means of accomplishing its purpose. Thus, the order is unconstitutional on its face because it is a directive "which does not aim specifically at evils within the allowable area of the State's control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

4. The Trial Court's Order of March 18, 1977 Violates Petitioner Leach's Right to a Fair and Public Trial.

A defendant in a criminal case has a constitutional right to a fair and public trial. An important reason for this guarantee is to prevent the government from railroading people in private. It is meant as a check on the government's power. As this Court said in *In Re Oliver*, 333 U.S. 257, 270 (1948): "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint upon possible abuse of judicial power."

Judge Sawicki's order effectively denied the Petitioner Leach a public trial because, *inter alia*, the court stenographer was bound by the order and could not explain to the public what had gone on in the trial, nor could the Petitioners discuss the case with anyone. The public was, therefore, deprived of some of the best sources of information on what was transpiring in the trial. As a consequence the "contemporaneous review in the forum of public opinion" was effectively stymied.

5. This Case Is Not Moot.

Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976), teaches that although a restrictive order imposed during

a trial is not in effect at the time the controversy reaches an appellate court, the controversy is not moot. This Court held:

> . . . jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one "capable of repetition, yet evading review." 427 U.S. at 546.

The controversy between the instant parties is "capable of repetition". Petitioner Leach has appealed his conviction and it may be reversed and remanded for a new trial where a similar restrictive order could again be issued by the trial court.

Further the Petitioners Hurley and Twohig continue to practice law and they may be attorneys for defendants where similar orders are issued. Likewise, Respondent Sawicki continues to sit as a judge in the Cuyahoga County Court of Common Pleas and may continue to issue similar *sua sponte* restrictive orders. In addition, this issue is likely to come up in other trials.

The question of gagging attorneys and defendants during trial is one that should be addressed by this Court, because otherwise such restrictive orders will continue to evade review and First Amendment rights will continue to be deprived. This Court recognized this problem in *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976), where it stated:

> . . . if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived . . . We therefore conclude that this case is not moot, and proceed to the merits. 427 U.S. at 547.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Entered March 14, 1977)

Case No. CR-27672

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO,
Plaintiff
vs.
ASHBY LEACH,
Defendant.

EUGENE J. SAWICKI, *J.*:

This order is entered for record on March 14, 1977.

The Court finds that the following orders and instructions are necessary and proper for the purpose of governing, controlling and regulating the conduct of the trial and all proceedings related thereto and of all persons interested in, attending or participating therein.

ITEM I. All approaches to courtrooms, offices and other rooms within the Justice Center premises, which are defined to be the entire building known as 1200 Ontario Street, Cleveland, Ohio, shall be kept clear for the purpose of free access thereto by those using them in the course of their employment or who have court house business to transact.

No person shall loiter in or about the 19th floor of the Justice Center Courts Tower.

No person shall demonstrate at or within the approaches of the Justice Center.

The approaches of the Justice Center are defined as the area along Ontario Street, between St. Clair Avenue and Lakeside Avenue, St. Clair Avenue, between Ontario Street and West 3rd Street, and Lakeside Avenue betwen Ontario Street and West 3rd Street, Cleveland, Ohio.

ITEM II. No cameras, recording devices, registering devices or any other electronic or mechanical equipment shall be used within the courtroom designated as 19-D by any person before, after or during the trial or related proceedings or at any recess or adjournment.

ITEM III. Witnesses, prospective and selected jurors, and those persons summoned but excused from serving as jurors, are forbidden to participate in interviews and from making statements for publicity from this date and until such time as a verdict in this case is returned in open court.

ITEM IV. No photographs of any kind of jurors, as a group or individually, shall be taken at any time or place without prior permission of the Court.

The list of names and addresses of the prospective and selected jurors shall not be released or published.

The names and addresses of the excused jurors may be published.

ITEM V. All Lawyers participating in this hearing, their office associates, staff members and employees under their supervision and control are forbidden to take part in interviews for publicity and from making extra-judicial statements from this date and until such time as a verdict is returned in this case in open court. Canon 20 of the Canons of Professional Ethics of the American Bar Association is hereby incorporated in and made a part of this order.

ITEM VI. Employees of this court and all other persons employed within the court house premises are forbidden to participate in interviews and from making statements for publicity from this date and until such time as a verdict in this case is returned in open court.

ITEM VII. The County Clerk of Court, County Sheriff, police officials and other law enforcement officers, their associates, deputies, assistants, staff members and personnel under their supervision and control who have participated in or who are expected to participate in the handling or processing of this matter are forbidden to participate in interviews and from making statements for publicity from this date and until such time as a verdict in this case is returned in open court.

ITEM VIII. Attendance in Court Room No. 19-D during all trial proceedings shall be limited to the seating accommodations of the court room. Only trial participants and accredited representatives of the news media shall be permitted inside the bar railing.

ITEM IX. All persons seeking admission to the court room will submit voluntarily to a search of his person before being admitted. The Sheriff is ordered to search each person seeking admission.

ITEM X. The first row seats immediately in front of the bar railing shall be reserved for accredited representatives of the news media who shall be admitted to the courtroom only upon presentation of credentials issued by the court. All seats behind the bar railing shall be available to members of the public, for each session of court, in the order of their appearance.

ITEM XI. No one except attorneys of record, their agents, court personnel, witnesses and jurors may handle exhibits except by order of this court.

ITEM XII. The bar of the court within the rail is reserved for counsel in the case, the defendant, court personnel, such witnesses as counsel may desire to be within the bar for consultation purposes, and accredited representatives of the news media where seated. No one else shall enter without permission of the court.

ITEM XIII. No person except subpoeaned witnesses shall be permitted to enter the courtroom after commencement of a session nor shall he be permitted to leave except during a recess or after adjournment.

ITEM XIV. Seating credentials for the representatives of the news media shall not be transferable and shall be used only by an accredited representative of the news medium to which issued. Any violation of this provision shall result in forfeiture of the credentials.

ITEM XV. This order is not intended to preclude any witness from discussing any matter in connection with the case with any attorney representing the State of Ohio or the defendant or any representative of such attorney.

ITEM XVI. This order shall be in force until this case has been disposed of or until further order of Court.

ITEM XVII. Notice of this order shall be served by the Sheriff on all counsel of record, Clerk of Courts of Cuyahoga County, Ohio, the Chief of Police of the City of Cleveland, the news media through their accredited representatives, and by posting a copy of it in the lobby of the Justice Center Courts Tower, 1200 Ontario Street, Cleveland, Ohio.

/s/ EUGENE J. SAWICKI, *Judge*

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS

(Dated March 16, 1977)

No. 37660

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT COUNTY OF CUYAHOGA

STATE OF OHIO, UPON THE RELATION OF ASHBY LEACH, ASHBY LEACH DEFENSE COMMITTEE, ROGER HURLEY, RAYMOND TWOHIG, AND JOHN DOE

Relators,

vs.

EUGENE SAWICKI, JUDGE OF THE COURT OF COMMON PLEAS,

Respondent.

A petition for Writ of Mandamus was filed in this case on March 15, 1977, attacking the action of the trial court in issuing a restrictive order in *Ohio v. Leach*, Cr-27672, regulating the conduct of non-parties to that case as well as the conduct of parties and their counsel. An order to show cause issued, returnable on March 16, 1977, at 9:30 a.m. All parties were represented by counsel at the hearing on order. The parties stipulated:

(1) That no hearing was held before the issuance of the restrictive order in *Ohio v. Leach, id.*

(2) That both sides would waive briefs on the single issue before the court—the propriety of issuing the restrictive order without a hearing.

(3) That an excerpt from the transcript of proceedings in *Ohio v. Leach, id.*, reflecting the Monday

morning, March 14, 1977, session of the trial court and consisting of fifteen (15) pages certified by Sandra G. Gieling, Official Court Reporter, Cuyahoga County, Ohio, be submitted as part of the record.

We find the restrictive order without legal foundation so far as it applies to Ashby Leach Defense Committee, John Doe, and other unnamed persons who are not parties to the case in *Ohio v. Leach, id.* The named relators are unrelated to the *Leach* case and in the same general posture as the relator publishing company and reporter in *State, ex rel. Beacon Journal Pub. Co. v. Kainrad* (1976), 46 Ohio St. 2d 349, 352, where the court said:

> "Before issuing any such order not to publish, it is obligatory upon the court to hold a hearing and make a finding that all other measures within the power of the court to insure a fair trial have been found unavailing and deficient."

CBS, Inc. v. Young (1975), 522 F.2d 234, 238, and cf. *Chase v. Robson* (1970), 435 F.2d 1059 at 1061:

> "We hold that before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of spech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice' . . . . Applying either the standard that the speech must create a 'clear and present danger,' . . . of a serious and imminent threat to the administration of justice, or the lesser standard that there must be a 'reasonable likelihood' . . . of a serious and imminent threat to the administration of justice, we hold that the trial court's order is constitutionally impermissible."

While we do not follow the *Robson* case, we note the persuasiveness of the proposition that the restrictive order contain "sufficient specific findings by the trial court" before an attorney's or party's conduct is limited. That portion of the existing restrictive order which applies to relators not party to the case of *Ohio v. Leach, id.*, must be stayed pending a hearing.

Without committing this Court to any ultimate position on the appropriateness of an order directed to the respondent on behalf of relators who are parties or counsel in *Ohio v. Leach, id.*, we find an order in mandamus an appropriate remedy for those *non-parties* to that litigation who clearly have no right of appeal.

Wherefore, it is ordered that a Writ of Mandamus issue directing the respondent, The Honorable Eugene J. Sawicki, to vacate his order of March 14, 1977, in every particular as it applies to relators or persons who are not parties or counsel in *Ohio v. Leach, id.*, and to enter no other order affecting the said non-party relators and persons absent a hearing and the necessary supporting findings. Exc.

DAY, C. J., KRENZLER, J., STILLMAN, J., concur

/s/ JACK G. DAY
Presiding Judge

SUPPLEMENT TO JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS

(Dated March 17, 1977)

No. 37660

COURT OF APPEALS OF OHIO

EIGHTH DISTRICT, COUNTY OF CUYAHOGA

STATE OF OHIO, UPON THE RELATION OF ASHBY LEACH, ASHBY LEACH DEFENSE COMMITTEE, ROGER HURLEY, RAYMOND TWOHIG, AND JOHN DOE,
Relators,

vs.

EUGENE SAWICKI, JUDGE OF THE COURT OF COMMON PLEAS
Respondent.

The following addendum is issued sua sponte to clarify the journal entry and opinion of March 16, 1977, in this case:

(1) The Court of Appeals order does not lift the trial court's restrictive order as to any relator who is connected with the trial whether that relator be defendant, defendant's counsel, or supporting staff of trial connected relators.

(2) The Court of Appeals order does not lift the trial court's restrictive order as to any participant in the trial as witness or otherwise.

(3) The Court of Appeals order does not reach nor intend to limit the trial court's inherent power to regulate and control decorum in the courtroom and insure the safety of persons attending or participating in the trial.

DAY, C.J., KRENZLER, J., STILLMAN, J., concur

/s/ JACK G. DAY, *Presiding Judge*

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Entered March 18, 1977)

No. CR-27672

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

STATE OF OHIO,
Plaintiff

vs.

ASHBY LEACH,
Defendant.

EUGENE J. SAWICKI, *J.:*

Pursuant to the Order of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga, Court of Appeals Number 37660, under date of March 16, 1977, the Order of March 14, 1977, of this Court is hereby vacated, and the following Order promulgated and entered for record on March 18, 1977:

The Court finds that the following orders and instructions are necessary and proper for the purpose of governing, controlling and regulating the conduct of the trial and all proceedings related thereto and of all persons interested in, attending or participating therein:

ITEM I. No cameras, recording devices, registering devices or any other electronic or mechanical equipment shall be used within the courtroom designated as 19-D of the Justice Center Courts Tower, located at 1200 Ontario Street, Cleveland, Ohio, by any person before, after or during the trial or related proceedings or at any recess or adjournment.

ITEM II. Witnesses, prospective and selected jurors, and those persons summoned but excused from serving as jurors, are forbidden to participate in interviews and from making statements for publicity from this date and until such time as a verdict in this case is returned in open court.

ITEM III. No photographs of any kind of jurors, as a group or individually, shall be taken at any time or place without prior permission of the Court.

The list of names and addresses of the prospective and selected jurors shall not be released or published.

The names and addresses of the excused jurors may be published.

ITEM IV. All lawyers participating in this hearing, their office associates, staff members and employees under their supervision and control are forbidden to take part in interviews for publicity and from making extrajudicial statements from this date and until such time as a verdict is returned in this case in open court. Canon 20 of the Canons of Professional Ethics of the American Bar Association is hereby incorporated in and made a part of this Order.

ITEM V. Employees of this Court are forbidden to participate in interviews and from making statements for publicity from this date and until such time as a verdict in this case is returned in open court.

ITEM VI. Attendance in Courtroom No. 19-D during all trial proceedings shall be limited to the seating accommodations of the courtroom. Only trial participants and accredited representatives of the news media shall be permitted inside the bar railing.

ITEM VII. All persons seeking admission to the courtroom will submit voluntarily to a search of his person before being admitted. The Sheriff is ordered to search each person seeking admission.

ITEM VIII. The first row seats immediately in front of the bar railing shall be reserved for accredited representatives of the news media who shall be admitted to the courtroom only upon presentation of credentials issued by the Court. All seats behind the bar railing shall be available to members of the public, for each session of court, in the order of their appearance.

ITEM IX. No one except attorneys of record, their agents, Court personnel, witnesses and jurors may handle exhibits except by order of this Court.

ITEM X. The bar of the Court within the rail is reserved for counsel in the case, the Defendant, Court personnel, such witnesses as counsel may desire to be within the bar for consultation purposes, and accredited representatives of the news media where seated. No one else shall enter without permission of the Court.

ITEM XI. No person except subpoenaed witnesses shall be permitted to enter the courtroom after commencement of a session.

ITEM XII. Seating credentials for the representatives of the news media shall not be transferable and shall be used only by an accredited representative of the news medium to which issued. Any violation of this provision shall result in forfeiture of the credentials.

ITEM XIII. This Order is not intended to preclude any witness from discussing any matter in connection with the case with any attorney representing the State of Ohio or the Defendant or any representative of such attorney.

ITEM XIV. This Order shall be in force until this case has been disposed of or until further order of Court.

ITEM XV. Notice of this Order shall be served by the Sheriff on all counsel of record, Clerk of Courts of Cuyahoga County, Ohio, the Chief of Police of the City of Cleveland, the news media through their accredited representatives, and by posting a copy of it in the lobby of the Justice Center Courts Tower, 1200 Ontario Street, Cleveland, Ohio.

/s/ EUGENE J. SAWICKI
Judge

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO

(Dated April 6, 1977)

No. 77-368

THE SUPREME COURT OF OHIO
THE STATE OF OHIO,
CITY OF COLUMBUS.

THE STATE OF OHIO, ex rel.
ASHBY LEACH et al.,
Relators,

vs.

EUGENE SAWICKI, Judge,
Respondent.

This cause originated in this court on the filing of a petition for a writ of mandamus and upon consideration of the motion, filed by counsel for relators, for expedited hearing and stay, it is ordered by the court that this motion be, and the same hereby is, denied.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO ON MOTION TO DISMISS

(Dated June 3, 1977)

No. 77-368

THE SUPREME COURT OF OHIO
THE STATE OF OHIO,
CITY OF COLUMBUS.

THE STATE OF OHIO, ex rel.
ASHBY LEACH et al.,
Relators,

vs.

EUGENE SAWICKI, Judge,
Common Pleas Court of Cuyahoga County,
Respondent.

This cause originated in this court on the filing of a complaint for a writ of mandamus and was considered in the manner prescribed by law. On consideration of the motion to dismiss, it is ordered by the court that this motion be sustained and cause dismissed.

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1977
No. 77-629

ASHBY LEACH, R. RAYMOND TWOHIG,
ROGER HURLEY,
Petitioners,

vs.

EUGENE SAWICKI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*
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Supreme Court of the United States

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vs.

EUGENE SAWICKI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions herein presented were raised first in the Court of Appeals for Cuyahoga County on a Petition for a Writ of Mandamus. That Court refused to issue a Writ as to the Petitioners in the instant case. Upon appeal

to the Supreme Court of Ohio, Petitioners' appeal and application for Writ of Mandamus was dismissed. These Ohio Courts decided the case in accordance with the Ohio Constitution and relevant case law. No substantial federal question is presented by the Petition for Writ of Certiorari.

COUNTER QUESTIONS OF LAW

1. Where a petition filed in the Supreme Court or in the Court of Appeals of Ohio is in the form of a proceeding in mandamus but the substance of the allegations makes it manifest that the real object of the relator is for an injunction, such a petition does not state a cause of action in mandamus and since neither the Supreme Court nor the Court of Appeals has original jurisdiction in injunction the action must be dismissed for want of jurisdiction.

2. The conclusion of any litigation renders moot those alleged legal issues which relate to protective orders issued by the subject court.

3. The issuance by a trial court of a protective order necessary to govern, regulate and control the conduct of a trial, when not prejudicial, is within the sound discretion of the trial court.

STATEMENT OF THE CASE

Ashby G. Leach was indicted by the Grand Jury of Cuyahoga County on September 1, 1976 for thirteen counts of kidnapping, one count of extortion, one count of possession of a criminal tool, and one count of felonious assault. The criminal episode which gave rise to this indictment occurred on August 26, 1976, when Leach held thirteen

people as hostages in the offices of the Chessie System in downtown Cleveland. Leach made a number of demands and threatened the innocent hostages with death for over nine hours before surrendering.

At his arraignment on September 2, 1976, Leach entered a plea of not guilty to all counts. Trial commenced in the courtroom of the Honorable Eugene Sawicki on March 14, 1977. On March 18, 1977, the trial judge issued a protective order proscribing extrajudicial statements by the defendant and counsel prior to the return of a verdict in the defendant's trial. Petitioners sought to attack this order by Writ of Mandamus in the Court of Appeals for Cuyahoga County and in the Supreme Court of Ohio. The Supreme Court granted a motion to dismiss the petition.

On April 5, 1977, the jury found Leach guilty of extortion, possession of a criminal tool, and assault.

REASONS FOR DENYING THE WRIT

1. Where a petition filed in the Supreme Court or in the Court of Appeals of Ohio is in the form of a proceeding in mandamus but the substance of the allegations makes it manifest that the real object of the relator is for an injunction, such a petition does not state a cause of action in mandamus and since neither the Supreme Court nor the Court of Appeals has original jurisdiction in injunction the action must be dismissed for want of jurisdiction.

Ohio Revised Code, Section 2731.01 defines mandamus:

> "Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board or person, commanding the performance of an act which the law

specially enjoins as a duty resulting from an office, trust, or station."

Petitioners in the case at bar did not seek to compel the trial judge to do something. On the contrary they wanted to prevent him from doing something, i.e., enforcing the protective order promulgated at the start of the trial.

Ohio courts have consistently dealt with this question. In *State, ex rel. Penn Mutual Life Insurance Co. v. Hahn*, 50 Ohio St. 714 (1893), the relator filed a petition in mandamus and a demurrer to the answer of the respondent, which demurrer was overruled. The basis for the court's ruling was stated as follows:

". . . For such a complaint the remedy is clearly by injunction and not by mandamus.

• • •

It is manifest that the real object of the relator is to prevent the Superintendent of Insurance from revoking its license to do business in this state.

. . . Here the object is to enjoin the superintendent from revoking the license." (718)

Similarly, petitioners improperly sought a writ of mandamus when they should have sought an injunction to restrain the trial court from enforcing its order. As Minshall, J., in a concurring opinion in *Hahn* stated:

". . . This is a suit for an injunction in the form of a proceeding in mandamus. The form, however, is nothing; it is the substance that gives real character to the proceeding. Hence, this court has no jurisdiction of the subject matter of the suit, and it should be dismissed for want of jurisdiction." (719)

The Supreme Court of Ohio has more recently considered this issue in the case of *State, ex rel. Pressley v. Industrial Commission of Ohio*, 11 Ohio St. 2d 141 (1967), wherein the Syllabus of the opinion states:

"4. Where a petition filed in the Supreme Court or in the Court of Appeals is in the form of a proceeding in mandamus but the substance of the allegations makes it manifest that the real object of the relator is for an injunction, such a petition does not state a cause of action in mandamus and since neither the Supreme Court nor the Court of Appeals has original jurisdiction in injunction the action must be dismissed for want of jurisdiction. (*State, ex rel. Stine v. McCaw*, 136 Ohio St. 41; *State, ex rel. v. Hahn*, 50 Ohio St. 714; *State, ex rel. Libbey-Owens-Ford Glass Co. v. Industrial Commission*, 162 Ohio St. 302, approved and followed.)"

Clearly, despite petitioners' label of "action in mandamus", they sought an injunctive remedy to restrain and enjoin the trial court from enforcing its order rather than to compel it to perform a clear legal duty. Thus their petition in the state courts did not state a cause of action and was properly dismissed by the Supreme Court of Ohio. Consequently, the petition for a Writ of Certiorari should be denied.

2. The conclusion of any litigation renders moot those alleged legal issues which relate to protective orders issued by the subject court.

The protective order issued by the trial court on March 18, 1977 was for the express purpose of insuring a fair trial for the defendant, now a Petitioner, Ashby Leach. It was in effect by its own terms only until the return of a verdict by the jury on April 5, 1977.

Any attack upon the legality of the protective order fails to present to this Court a justiciable controversy. Rather, with the termination of the action to which the protective orders were made applicable, any dispute concerning their legitimacy must be deemed hypothetical in nature, and therefore moot. Where an appellant has no legitimate interest to protect by an appeal, such appeal is moot so far as such appellant is concerned and must be dismissed. *Mid-America Telephone Co. v. P.U.C.O.*, 173 Ohio St. 333 (1962); see, *Travis v. Pub. Util. Comm. of Ohio*, 123 Ohio St. 355 (1931).

This Honorable Court, in *DeFunis v. Odegaard*, 416 U.S. 312, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974), reaffirmed the long-standing practice of hearing only those appeals which present a justifiable "case or controversy". Cf. *Marberry v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

With the conclusion of appellant's trial and the resultant verdict, there was effected a termination of the protective orders in issue. Petitioners conceded this point in the Courts of Appeals for Cuyahoga County when they filed a Motion for Expedited Hearing and Stay which stated: ". . . the writ will be moot absent a stay." For the foregoing reasons, petitioners' instant action is moot and the Petition for a Writ of Certiorari should be denied.

3. The issuance by a trial court of a protective order necessary to govern, regulate and control the conduct of a trial, when not prejudicial is within the sound discretion of the trial court.

The issuance of the protective order of March 18, 1977, by the trial court did not arbitrarily restrict the rights of Petitioners but rather was designed to protect the rights of the Petitioner Leach during the trial of his criminal case.

Due to the circumstances which preceded Petitioner Leach's trial, considerable publicity was generated and great public interest and awareness ensued. Viewed in this light, the protective order was necessary to shield the jury and to promote an atmosphere wherein the issues at trial could be fairly adjudicated solely on the law and the evidence, not the statements of counsel made outside of court. The issuance of a protective order so structured was well within the discretion of the trial court.

Petitioners' reliance upon this Honorable Court's decision in *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976) is not well founded. There the Court forbade restrictions by the trial court on the rights of the news media to publish accounts of the trial. In the instant case, the trial court merely proscribed the extra-judicial statements of counsel and the defendant. The media was free to report on anything and everything that happened in court including the protective order. In *Nebraska*, the Court said:

> "This Court has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial publicity. See *Sheppard v. Maxwell*, 384 U.S. at 361-362, 16 L. Ed. 2d 600, 86 S. Ct. 1507, 6 Ohio Misc. 231, 35 Ohio Op. 2d 431. Professional studies have filled out these suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone." (427 U.S. at 564)

In *Sheppard v. Maxwell, supra*, the Court said:

> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as refusal of Sheppard to submit to

interrogation or take any lie detector tests. . ." (384 U.S. 333, at 361)

The American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press (Approved Draft 1968) recommended that:

"During the trial of any criminal matter, including the selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case."

A protective order similar to that involved in the instant case was at issue in *Hamilton v. Municipal Court for Berkeley-Albany Judicial District*, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168, 33 A.L.R.3d 1029 (1969), *cert. denied* 396 U.S. 985, 24 L. Ed. 2d 449, 90 S. Ct. 479. There the appellants deliberately violated a trial court's protective order and sought by a Writ of Prohibition to prevent the court from conducting a contempt of court hearing on the charge. Appellants were the defendants in the original criminal prosecution and their lawyers. They argued in the higher court that the trial court's order was an unconstitutional restriction upon their right of free speech. The court, citing *Sheppard v. Maxwell, supra,* said:

"We construe this language of the court to mean that in proper cases, where the right to fair trial may be at issue, the court is required to take steps to control the release and dissemination of facts and evidence likely to be presented to the court or the jury in the course of the trial. Thus authority for the

issuance of the pretrial order in this case seems to be unassailable." (270 Cal. App. 2d 797, at 800-801)

In response to the charge that the order in *Hamilton* was overly broad, the court said:

"The court's order sought only to have the issues judicially determined in open court, on competent evidence, rather than by the community upon the basis of information supplied by partisans and carried on by the news media. The order applied to the parties and their counsel. Such persons were before the court and subject to its proper orders." (270 Cal. App. 2d 797, at 804)

The trial court's restrictive order was not unconstitutional and the Petition for a Writ of Certiorari should be denied.

CONCLUSION

Based upon the foregoing authority we respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1977
No. 77-629

ASHBY LEACH, R. RAYMOND TWOHIG,
ROGER HURLEY,
Petitioners,

vs.

EUGENE SAWICKI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONERS

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vs.

EUGENE SAWICKI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONERS

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

In the Brief of Respondent in Opposition, Respondent raises an issue not discussed in the Petition, namely, that the Supreme Court of Ohio lacked jurisdiction over the mandamus action filed in that court by petitioners. Respondent apparently is suggesting that an independent state ground existed for the dismissal of the complaint for writ of mandamus, so that this Court should not, as requested, reach the federal constitutional issues.

Respondent's assertion that the Supreme Court of Ohio lacked jurisdiction is, however, contradicted by history, reason and law.

From the history of the instant action, *Pressley v. Industrial Commission of Ohio,* 11 Ohio St. 2d 141 (1967), the case relied on by Respondent, is inapposite. The portion of the Syllabus quoted by Respondent states that "neither the Supreme Court nor the Court of Appeals" has jurisdiction, yet Petitioners here did obtain a writ of mandamus from the Court of Appeals (pp. A5-A7 of the Appendix to the Petition herein) directed to the original, March 14 restrictive order. The Court of Appeals obviously recognized that this case did not involve the "injunction" issue discussed in *Pressley.* The Nebraska Supreme Court likewise recognized mandamus as the appropriate remedy in *State v. Simants,* 236 N.W.2d 794 (1975), *reversed sub nom. Nebraska Press Assoc. v. Stuart,* 427 U.S. 539 (1976).

Respondent suggests that neither the Court of Appeals nor the Supreme Court of Ohio had jurisdiction to review the restrictive order of March 18, implying that only the Court of Common Pleas was available to grant this "injunctive remedy". This nonsensical suggestion would have required Petitioners to seek an injunction against a judge of the Court of Common Pleas in that very court, so that reason, as well as history, is against Respondent.

Finally, that relief from Respondent's action could be obtained by petitioning the Courts of Appeals or the Supreme Court of Ohio for a writ of mandamus is hornbook law:

> "[M]andamus is the proper remedy to compel the performance of any act which an inferior court has jurisdiction to perform and no jurisdiction or discretion to refuse. . ." 35 OHIO JURISPRUDENCE 2d 371.

> "[T]he lower court or judge may be compelled to act in a particular way when the facts are not in dispute and the court has come to a wrong conclusion of law therefrom. . ." 35 OHIO JURISPRUDENCE 2d 375.

Pressley v. Industrial Commission, supra, 11 Ohio St. 2d 141, cited by Respondent, is a decision *upholding* the use of mandamus to compel the respondent to grant relator-employee's application for an award, despite the availability of injunctive relief in the Court of Common Pleas. The dictum quoted by Respondent in his Brief in Opposition is explained in *Pressley* at 11 Ohio St. 2d at 150, where the Court states that when an action merely seeks to "restrain and enjoin respondents rather than to compel respondents to perform a clear *legal duty*" (emphasis added), the action is one in injunction, not mandamus. Here, of course, as the Court of Appeals recognized when it issued the writ, a legal duty to obey the commands of the Constitution of the United States exists, and a "wrong conclusion" about what the Constitution commands may be corrected by mandamus.

Because, as shown above, the Supreme Court of Ohio had jurisdiction over Petitioners' mandamus complaint, and because, as will be discussed below, no adequate remedy at law existed, the dismissal of the complaint was clearly a decision on the merits, since these two, plus the "legal duty" element, are the conditions precedent to the consideration of a mandamus complaint; *Pressley v. Industrial Commission, supra,* 11 Ohio St. 2d 141, paragraph 5 of the Syllabus, explained at 11 Ohio St. at 160, and further clarified at 164.

Certainly, no adequate legal remedy existed. For example, neither disobedience nor appeal could have vindicated Petitioners' rights. Disobedience of the order would not have obtained review, since the constitutionality of

the order would have been irrelevant in a contempt proceeding; *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *State ex rel. Beil v. Dota*, 168 Ohio St. 315 (1958). Review by appeal was likewise unavailable, certainly to Petitioners Hurley and Twohig who were non-parties. Petitioner Leach's ability to test the order on appeal was little greater: first, he might not have been convicted; and, even if convicted, an assignment of the prior restraint as an error on appeal would have been a novel argument. Petitioners' *only* available remedy was thus mandamus.

In summary, because the Supreme Court of Ohio necessarily decided this case on its merits, not on procedural grounds, this Court should not be distracted in its decision on whether to grant review.

Respectfully submitted,

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